

**Monfort, Inc. and United Food and Commercial Workers International Union Local 22, AFL-CIO, Petitioner.** Case 17-RC-11173

August 2, 1995

**DECISION AND DIRECTION**

BY CHAIRMAN GOULD AND MEMBERS BROWNING  
AND COHEN

The National Labor Relations Board, by a three-member panel, has considered challenges to an election held on October 20, 1994, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 736 for, and 727 against, the Petitioner, with 37 challenged ballots, a sufficient number to affect the results.<sup>1</sup>

The Board has reviewed the record in light of the exceptions<sup>2</sup> and briefs and has adopted the hearing officer's findings<sup>3</sup> and recommendations<sup>4</sup> as modified below.

We agree with the hearing officer's recommendations, for the reasons stated by him, to overrule the challenges to the ballots of Lorenzo Ruiz,<sup>5</sup> Ricardo Munoz, Timoteo Francisco Pascual, Le Lam Hoa Nguyen,<sup>6</sup> and Catalina Aldana. We disagree, however, with his recommendation to overrule the challenges to the ballots of Nhan Thanh Nguyen, Joe Garcia,

Kahmphoui Keophalychanh, and Souvanh Phouthavong.

The Board agent challenged the ballots of N. Nguyen, Garcia, Keophalychanh, and Phouthavong because when each employee appeared at the polls to cast a vote each was told by the observers that his name had already been checked off the eligibility list. The hearing officer credited the testimony of each of these employees that each attempted to vote only once in the election and did not give his or her employee identification card to anyone else on the day of the election. Based on his crediting of the four employees, the hearing officer overruled the challenges to their ballots and recommended that their ballots be opened and counted. He reasoned that "[t]o find otherwise and disenfranchise these employees because their names were marked off the eligibility list, perhaps inadvertently and by mistake, would run afoul of the Board's preeminent policy that all eligible voters must be afforded a reasonable opportunity to cast their votes."

In its exceptions, the Petitioner contends that these four challenges should be sustained. It argues, inter alia, that a presumption of fairness and regularity attaches when an election is conducted in compliance with the Board's procedures and that the Employer did not introduce any evidence here to rebut this presumption. The Petitioner further argues that the hearing officer's recommendation encourages fraud and abuse of the election procedures by substituting for the objective, orderly preelection means of establishing voter identification, "fruitless" cross-examination in an election of any size. It further argues that the latter may encourage employees to vote twice with the possibility that their second vote will be counted if their testimony is credited. We find merit to the Petitioner's contentions.

The Board has been entrusted by Congress with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.<sup>7</sup> To this end, the Board allows each party to be represented at the polling place by an equal number of observers. The observers not only represent their principals but also assist in the conduct of the election and are given the responsibility, inter alia, to identify and check off voters on the eligibility list as they appear to vote.<sup>8</sup> As the Board stated in *Newport News Shipbuilding*:<sup>9</sup>

Errors in the important task of monitoring who votes and who votes subject to challenge are minimized by the fact that normally observers from each party in the election are given the re-

<sup>1</sup> The parties stipulated that 16 of the challenged ballots were cast by eligible voters, and that 3 of the challenged ballots were cast by ineligible voters. They also stipulated that eight unconventionally marked ballots were to be counted in accordance with the Board agent's rulings. Our direction, therefore, includes the counting of the 16 ballots of the voters stipulated to be eligible and of those 8 unconventionally marked ballots that the Board agent ruled should be counted.

<sup>2</sup> We grant the Petitioner's request to strike the Employer's Exh. A, "Order Approving Final Lump Sum Settlement" by the Nebraska Workers' Compensation Court, which was attached to the Employer's brief, because it is not part of the record in this case.

<sup>3</sup> The Employer and the Petitioner have excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

<sup>4</sup> In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to sustain the challenge to the ballot of James E. Pottorff.

<sup>5</sup> For the reasons set forth in *Vanalco, Inc.*, 315 NLRB 618 (1994), we reaffirm the test for the eligibility of employees on sick leave at the time of the election—such as Lorenzo Ruiz—set forth in *Red Arrow Freight Lines*, 278 NLRB 965 (1986).

<sup>6</sup> The hearing officer incorrectly stated that translator Le Lam Hoa Nguyen is supervised by Training Supervisor Wanda Kayl. She is supervised by another training supervisor, Ed Quipping. Both Kayl and Quipping in turn report to the head of the training department, Steve Wirtz. The hearing officer's inadvertent error does not affect our finding that the challenge to the ballot of Le Lam should be overruled and her ballot counted.

<sup>7</sup> *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330 (1946).

<sup>8</sup> NLRB Casehandling Manual (Part Two), sec. 11310, 11322.1.

<sup>9</sup> 239 NLRB 82 (1978), aff'd. in summary judgment proceeding 239 NLRB 1028 (1978), remanded in part 594 F.2d 8 (4th Cir. 1979).

sponsibility for checking off voters. Thus, inadvertence or misconduct which may not be noticed by the Board agent is often brought to his or her attention by an alert observer. In addition, any discrepancy discovered by an observer may lead to a voter being challenged by either an observer or a Board agent.

The election in this case was conducted in accordance with the Board's practice described above. The undisputed testimony shows that the Employer and the Petitioner had observers at the polls and that when employees presented themselves to the observers to vote, they showed employee identification cards with their photographs and printed name to both observers. Each observer then located the name on the *Excelsior* list and independently checked it off, indicating that the named employee had voted. At the close of the election, observers for both parties signed the Certification of Conduct of Election, certifying that the election had been fairly conducted.

Given this evidence, we are unwilling to overrule the challenges to the ballots of N. Nguyen, Garcia, Keophalychanh, and Phouthavong based merely on their testimony that they had not voted despite the fact their names were checked off on the *Excelsior* list by the observers. Neither party attempted at the hearing to offer evidence that the names of these four voters were checked off the *Excelsior* list by mistake or inadvertence.<sup>10</sup> Under these circumstances, to overrule these challenges would have the effect of undermining the role of the observers in the election, as well as the Board's established procedures for the conduct of election. Because the observers for both parties agreed, by checking the four names off the *Excelsior* list, that these employees had previously voted in the election, we will not, on the basis of the affected employees' testimony alone, disturb this agreement.<sup>11</sup> Accordingly, we sustain the challenges to these four ballots.

#### DIRECTION

IT IS DIRECTED that the Regional Director shall, within 14 days from the date of this Decision and Direction, open and count the ballots of Omar Garcia

Hernandez, Julio V. Perez, Julio Rivas Perez, Miguel Bautista Piaz, Miguel Flores, Gilbert Garcia Jr., Isabel Cruz Mendoza, Francisco Vasquez Rivera, Tomas Francisco-Tomas, Laurie A. Rodriguez, Lawrence Hedglin, Dora A. Mostek, Jack Berger, Bobby Ducharme, Gail Broxterman, Eleazer Torres, Lorenzo Ruiz, Ricardo Munoz, Timoteo Francisco Pascual, Le Lam Hoa Nguyen, and Catalina Aldana; open and count the eight unconventionally marked ballots in accordance with the rulings made by the Board agent at the election; and serve on the parties a revised tally of ballots.

IT IS FURTHER DIRECTED that thereafter, consistent with the Board's decision in this proceeding, issued February 2, 1995, if the Petitioner wins, the Region shall investigate and resolve the Employer's reinstated objections. If the Petitioner loses, the Regional Director shall investigate and resolve the Petitioner's objections.

MEMBER COHEN, dissenting in part.

For the reasons stated by the hearing officer, I agree with my colleagues that the challenges to the ballots of Ricardo Munoz, Timoteo Francisco Pascual, Le Lam Hoa Nguyen, and Catalina Aldana should be overruled and their ballots should be counted. I do not, however, agree with the majority that the challenge to the ballot of Lorenzo Ruiz should be overruled, nor would I sustain the challenges to the ballots of Nhan Thanh Nguyen, Joe Garcia, Kahmphoui Keophalychanh, and Souvanh Phouthavong.

Lorenzo Ruiz, whose name was not on the *Excelsior* list, voted subject to challenge. The hearing officer found, and the majority agrees, that this challenge should be overruled because Ruiz, who missed work for 18 months prior to the election because of on-the-job injuries, had neither resigned nor been terminated as of the election. See *Red Arrow Freight Lines*, 278 NLRB 965 fn. 4 (1986). I disagree with the majority's test for eligibility and with their result. As I stated in my dissenting opinion in *Vanalco, Inc.*, 315 NLRB 618 (1994), I believe that the relevant inquiry is not whether Ruiz had formally resigned or been terminated but, instead, whether he had a reasonable expectancy of returning to the unit as of the election. Because this "reasonable expectancy" issue was not fully litigated, I would remand this issue to the hearing officer to determine whether Ruiz had a reasonable expectancy of return.

Nhan Thanh Nguyen, Joe Garcia, Kahmphoui Keophalychanh, and Souvanh Phouthavong voted under challenge because their names were already checked on the *Excelsior* list when they attempted to vote. At the hearing, the four employees testified that they had attempted to vote only once and that, on the date of the election, they had not given their picture identification cards—which were used for voter identi-

<sup>10</sup> Cf. *Jasta Mfg. Co.*, 246 NLRB 48, 61 (1979), enf. mem. 634 F.2d 623 (4th Cir. 1980), in which the parties agreed and substantial evidence showed that employee Brenda Valentine's name had been mistakenly and inadvertently checked off when her mother, also an employee, voted earlier.

<sup>11</sup> Our dissenting colleague's surmise, by a review of the names checked off the *Excelsior* list, that the four names at issue "may have been mistakenly or inadvertently checked" does not amount to a substitute for the actual presentation of evidence of some misconduct or error by the observers. Absent such evidence, which the parties had an opportunity to present at the hearing, there is no evidentiary basis for finding that the election was not fairly and properly conducted. Therefore, without more than a "suggestion of possible mistake," such as our colleague relies on, we sustain the challenges to these four ballots.

fication—to any other employees. The hearing officer specifically credited this testimony, which was uncontradicted. He concluded that the four employees should not be disenfranchised as a result of possible inadvertent or mistaken markings on the *Excelsior* list.

The majority rejects the hearing officer's recommendation and sustains the challenges to the four ballots on the bases that when each appeared at the polls to vote, his or her name had already been checked off the *Excelsior* list, and that there was no record evidence that the checks were improperly made. Under the facts of this case, I disagree. The hearing officer has expressly credited the testimony of the four employees that they did not vote. Further, an examination of the *Excelsior* list supports the hearing officer's finding that the four names may have been mistakenly or inadvertently checked. Thus, of the 36 employees on the list surnamed Garcia, several have first names similar to Joe Garcia, and some of these individuals were not marked as having voted. Similarly, of the 50 unit employees named "Nguyen," some have names similar to Nhan T. Nguyen. The name of one employee, "Thanh H. Nguyen" was not checked off the list. The list also contained three employees surnamed "Keophalychanh," one with the similar first name of "Khamphya" whose name was not checked off. Finally, although all of the "Phouthavongs" on the list were checked off, there are similar last names like "Phanthavong," and several last names approximating Phouthavong's first name, "Souvanh."

My colleagues argue that I have shown only a possible mistake. In fact, I have shown much more. I have shown that the four employees did not previously vote

and that their names were nonetheless checked off as having voted. I have also shown that they did not give their picture identification cards to other employees. Finally, I have shown a substantial similarity in names. Although these facts may not definitively establish why these employees were incorrectly marked as having voted, they nonetheless establish that the employees were in fact incorrectly marked as having voted. As the hearing officer said, the Board's preeminent policy is to ensure that all eligible employees are given a reasonable opportunity to vote. That policy is offended here. I therefore dissent.

My colleagues do not dispute the fact that the four employees were eligible to vote. Nor do they quarrel with the hearing officer's credibility finding that they had not voted. Notwithstanding these facts, my colleagues proceed to disenfranchise the four employees. On the other hand, my colleagues rightly point out the role of observers in the election process, and the interest in according finality to their agreed-upon actions. In cases where there is no suggestion of possible mistake by the observers, I would be inclined to accord finality to their actions. But, where, as here, there is a suggestion of possible mistake, and credited evidence that eligible employees were not permitted to vote, I would strike the balance in favor of the right of eligible employees who have voted under challenge to have their votes count.

Based on the above, I disagree with my colleagues and I would open and count the ballots of Nhan Thanh Nguyen, Joe Garcia, Khamphoui Keophalychanh, and Souvanh Phouthavong.